FILE COPY

Office-Supreme Court, U. S.
FILED
AUG 23 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 240

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

SUEL O. ARNOLD,
Attorney for Petitioner.

GLENN R. DOUGHERTY,
Of Counsel.

THE BLAKELY-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

SUBJECT INDEX.

PETITION.

	PAGE
Statement of the Matter Involved	1
This Court Has Jurisdiction	4
The Question Presented	4
Reasons Relied Upon for Allowance of Writ	4

BRIEF.

The Opinion Below	7
Jurisdiction	7
Statement of the Case	8
Errors Relied Upon	14

ARGUMENT.

I. Berk *vs.* Milwaukee Automobile Insurance Company, 245 Wis. 597, is controlling	16
II. The conclusion of the Circuit Court of Appeals that the attorneys for the insurance company recognized the likelihood of a judgment being entered in excess of the policy limits is not supported by the evidence	16
III. The finding that throughout the compromise negotiations there was no discussion of liability is not sustained by the evidence	17
IV. Refusal of an insurance company to adopt the recommendations of its attorneys with reference to settlement does not constitute bad faith	18
V. Neither stubbornness nor obstinacy on the part of an insurance company in refusing to settle a case constitutes bad faith	19
VI. The fact that Central Surety & Insurance Corporation had procured reinsurance has no bearing on the question of bad faith	20
Conclusion	21

TABLE OF CASES AND AUTHORITIES.

Berk v. Milwaukee Automobile Insurance Company, 245 Wis. 597 ..... 3, 4, 5, 14, 16, 17, 18, 19
Dabareiner v. Weisflog, 253 Wis. 23 5
Hilker v. Western Automobile Insurance Co., 204 Wis. 1 ..... 3, 4, 5
Lanferman v. Maryland Casualty Co., 222 Wis. 406 .. 3, 4, 5
Lange v. Heckel, 171 Wis. 59 19
Schultz v. Brogan, 251 Wis. 390 12
Swinkels v. Wisconsin Michigan Power Co., 221 Wis. 280 12
Wakefield v. Globe Indemnity Co., 246 Mich. 645 .... 17, 18
Wisconsin Zinc Co. v. Fidelity & D. Co., 162 Wis. 39 .. 3, 45
Ziegler v. The Insurance Company, 238 Wis. 238 19

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner and Appellant Below,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent and Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable Fred M. Vinson, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

Summary Statement of the Matter Involved.

This is an action brought in the District Court of the United States for the Eastern District of Wisconsin by Royal Transit, Inc. to recover from the respondent, Central Surety & Insurance Corporation, the amount of Seventeen

Thousand Five Hundred ($17,500.00) Dollars, with interest and costs. The complaint alleged that Royal Transit, Inc. was required to pay the sum of Seventeen Thousand Five Hundred ($17,500.00) Dollars in satisfaction of a judgment in an action brought in the Circuit Court for Milwaukee County against Royal Transit, Inc. by one, Zamecnik, an employee of the Allis Chalmers Company of Milwaukee.

Royal Transit, Inc. is engaged in the trucking business. On the 19th day of July, 1937, it delivered a number of steel plates to the Allis Chalmers plant. In his complaint, Zamecnik alleged that as a result of the negligence of the truck driver employed by Royal Transit, Inc. the plates fell from the truck and inflicted serious injuries to Zamecnik, including a complete and permanent paralysis below his diaphragm.

Zamecnik brought suit in the Circuit Court for Milwaukee County to recover damages in the amount of One Hundred Thousand ($100,000.00) Dollars from Royal Transit, Inc. and Central Surety & Insurance Corporation, which had issued a policy of automobile liability insurance to Royal Transit, Inc. in the amount of Forty-five Thousand ($45,000.00) Dollars for any one injury.

Before the Zamecnik case was called for trial in the Circuit Court for Milwaukee County, Zamecnik made an offer of settlement of Forty Thousand ($40,000.00) Dollars. Royal Transit, Inc. which was confronted with the possibility of the entry of a judgment against it in the event of trial in an amount in excess of the policy limits, offered to contribute Five Thousand ($5,000.00) Dollars toward such settlement. Central Surety & Insurance Corporation refused to compromise the action, the case was tried and determined by the Court, without a jury, and a judgment of Sixty-two Thousand Five Hundred ($62,500.00) Dollars was entered against Royal Transit, Inc.

Royal Transit, Inc. paid that portion of the judgment in

excess of the policy limits amounting to Seventeen Thousand Five Hundred ($17,500.00) Dollars, together with interest, and thereafter brought this suit in the District Court of the United States for the Eastern District of Wisconsin alleging that the Central Surety & Insurance Corporation was guilty of bad faith in refusing to settle the Zamecnik action within the policy limits.

Royal Transit, Inc. and Central Surety & Insurance Corporation agreed that the question as to whether the insurance company was guilty of bad faith was dependent upon the law in the State of Wisconsin. Central Surety & Insurance Corporation contended that the question turned on *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597, which exonerated an insurance company from liability to an assured for failure to settle a claim against the assured within the policy limits. Counsel for Royal Transit, Inc. contended that the case was governed by the earlier cases of *Wisconsin Zinc Company* v. *Fidelity & D. Co.,* 162 Wis. 39, *Hilker* v. *Western Automobile Insurance Company,* 204 Wis. 1, and *Lanferman* v. *Maryland Casualty Company,* 222 Wis. 406. Royal Transit, Inc. also contended that *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597, was distinguishable upon the ground that there the assured did not desire the insurance company to compromise the action, whereas in the Zamecnik case, Royal Transit, Inc. was insistent that the action be settled.

The trial court found that Central Surety & Insurance Corporation was guilty of bad faith in refusing to settle the Zamecnik action within the policy limits and gave judgment for the plaintiff in the amount of Seventeen Thousand Five Hundred ($17,500.00) Dollars, together with interest and costs. Upon appeal the judgment of the trial court was affirmed.

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because the Circuit Court of Appeals of the Seventh Circuit has decided an important question of local law in a way probably in conflict with the applicable local decisions.

Question Presented.

The question herein presented is whether the Circuit Court of Appeals for the Seventh Circuit in determining that the Central Surety & Insurance Corporation was guilty of bad faith toward its insured, Royal Transit, Inc. in refusing to settle the Zamecnik action for an amount within the limits of the insurance policy failed to follow the decisions in *Berk* v. *Milwaukee Automobile Insurance Company*, 245 Wis. 597; *Lanferman* v. *Maryland Casualty Company*, 222 Wis. 406, *Hilker* v. *Western Automobile Insurance Company*, 204 Wis. 1, and *Wisconsin Zinc Company* v. *Fidelity & D. Co.*, 162 Wis. 39, which govern the liability of an insurance company in circumstances such as existed in the case at bar.

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals in holding that Central Surety and Insurance Corporation was guilty of bad faith, has decided an important question of local law in conflict with the decisions of the Wisconsin Supreme Court.

2. The constant shrinkage in purchasing power of the dollar resulting from the present economic condition has given rise to verdicts in automobile accident cases grossly in excess of the customary $5,000.00 and $10,000.00 automobile accident policy coverage.

3. Large verdicts in Wisconsin have also resulted from

the approval by the Supreme Court of instructions by trial courts that the jury may consider the present depleted purchasing power of a dollar in determining damages. *Dabareiner* v. *Weisflog,* 253 Wis. 23.

4. Since automobile accidents have long since become the most prolific source of litigation, the liability of insurance companies for failure to settle cases within policy limits has become a matter of tremendous local importance by reason of the fact that insureds do not pay for protection in excess of the policy limits.

5. *Wisconsin Zinc Company* v. *Fidelity & D. Co.,* 162 Wis. 39, decided by the Supreme Court in 1916, holds that recovery cannot be had against an insurance company for negligence in failing to settle a case within the policy limits but that recovery is limited to cases where the insurance company is guilty of bad faith.

6. *Hilker* v. *Western Automobile Insurance Company,* 204 Wis. 1, holds that an insurance company which fails to make an honest, efficient and intelligent investigation of the facts and which fails to notify the assured of the possibility or probability of a recovery in excess of the policy limits is guilty of bad faith.

7. *Lanferman* v. *Maryland Casualty Company,* 222 Wis. 406, holds that where an insurance company admits liability but insists that the assured pay the costs where, if a judgment was entered against the insurance company, the policy required the payment of costs, is guilty of bad faith.

8. *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597, holds that an insurance company which makes an honest and efficient investigation of the facts and notifies the assured of the possibility of a judgment being entered in excess of the policy limits is not guilty of bad faith in refusing to settle an action brought against the insured for an amount within the policy limits. Bad faith is held to be

in the nature of fraud which must be proved by clear and satisfactory preponderance of the evidence. Bad judgment on the part of the insurance company does not constitute bad faith, nor does a failure to settle where the attorneys defending the insurance company recommend settlement. Action amounting to ill will or a desire to injure the assured must be proved in order to establish bad faith and consequent liability of the insurance company.

9. Failure of the insurance company to make an offer of settlement in the Zamecnik case large enough to be accepted by Zamecnik did not constitute bad faith because the insurance company believed that it had a good defense and because the record was barren of any evidence of ill will or a deliberate design on the part of the insurance company to injure its insured Royal Transit, Inc.

Respectfully submitted,

SUEL O. ARNOLD,
Attorney for Petitioner and Appellant Below.

GLENN R. DOUGHERTY,
Of Counsel.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 168 Federal Reporter (2d) 345. The opinion is included in the record but is not printed because of the filing of ten copies of the transcript of the record in the Circuit Court of Appeals pursuant to Subdivision 7 of Rule 38, Rules of the Supreme Court.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 a, of the Judicial Code, 28 U. S. C. A. Section 347. The

Circuit Court of Appeals in this case "has decided an important question of local law in a way probably in conflict with applicable local decisions." Supreme Court Rule 38 (5) (b).

Judgment was entered in this case by the United States Circuit Court of Appeals on June 1, 1948.

Statement of the Case.

There are no controverted issues of fact in this case. The questions arising upon this petition derive from the finding that the insurance company was guilty of bad faith in refusing to settle the Zamecnik action for an amount within the policy limits, and the finding that the limited liability of the petitioner because of the procurement of re-insurance had a bearing upon the good faith of the insurance company in refusing to settle the Zamecnik case.

In determining that the insurance company was guilty of bad faith the District Court and the Circuit Court of Appeals gave scant attention to the fact that the question of liability of Royal Transit, Inc. was vigorously contested at the trial before the Circuit Court for Milwaukee County. In the Supreme Court of the State of Wisconsin, the narrative statement of the testimony of the witnesses occupies four hundred fourteen printed pages (Exhibit 11 at the trial before the District Court). Seldom indeed, is such record found in an action brought to recover damages for personal injuries.

Schultz, the Royal Transit truck driver, testified at the trial of the Zamecnik action, that the first thing he did after parking his truck at the place which had been designated by the Allis-Chalmers employees was to remove the chains which held the plates to the truck. (Exhibit 11, Page 464.) This was accomplished by unloosening the binders in front which held the two units of chains to-

gether, and then fastening the two long chains together again on the floor of the truck by means of one of the binders. (Exhibit 11, Pages 165, 464, 465, 466.) Schultz then removed the two hooks from the front of the plates and separated them from the two short chains to which they were attached and piled the hooks and chains back of the cab. (Exhibit 11, Pages 464-465.) Then Schultz removed the bed spring and placed it back of his cab, after which he cleaned up the floor of his truck. (Exhibit 11, Page 467.)

On cross-examination, Schultz testified that the first thing he did was to remove the front chains and after that he removed the bed spring and that before the accident occurred he had both long chains secured by a binder. (Exhibit 11, Pages 474-475.)

The testimony of Schultz was corroborated by Goyk, an employee of Allis-Chalmers. The latter testified that he saw Schultz reach up from the platform of the truck and remove a hook from the top of the plates on the south side. (Exhibit 11, Pages 203-204.) Goyk further testified that after the accident he noticed a hook attached to the plates which fell on the north side and the chain lying over the plates attached to the hook, but he did not see any hook or chain on the plates on the south side. (Exhibit 11, Page 204.) Goyk also testified that after the accident he looked in the truck and saw that some hooks had been piled up. (Exhibit 11, Page 204.)

Additional corroboration of Schultz's testimony was furnished by the testimony of Schilling who was the shipping and receiving clerk employed by Allis-Chalmers. At the Coroner's Inquest, Schilling testified that he told Schultz where to back his truck, and that immediately after the truck had stopped, the truck driver got on the back of the truck and started loosening up the chains. (Exhibit 11, Page 262.) Schilling then went away and gave the crane

man instructions relative to the removal of the plates from the truck. (Exhibit 11, Page 262.) After a while, Schilling came back to the truck, at which time Shrake was on a ladder fixing a C-clamp. (Exhibit 11, Page 262.) When Schilling came back the second time, Schultz was pulling on a screen or bed spring. (Exhibit 11, Page 262.) Schilling then walked under the plates and just barely cleared them before they fell. (Exhibit 11, Page 262.) In view of the testimony of Schultz, Goyk and Schilling, it is clear that the finding of the trial court in the Zamecnik case that the releasing of the chains "caused the plates on the left and southerly side of the said truck to suddenly fall outward" (Exhibit 11, Page 102) was not supported by the greater weight of the evidence.

The cause of the plates falling was the manipulation of Shrake while he was on a ladder attempting to fasten a forty-pound C-clamp on the top of the plates. In its opinion, the Supreme Court of Wisconsin held that the placing of the ladder against the plates did not cause the plates to fall. On this point, the Court said (Tr. 115-116):

> "The ladder leaning inward against the outside of that set of plates and Shrake's weight, while standing on the ladder, necessarily tended rather to press the top of the plates inward and to thus retard their falling outward, instead of causing them to fall in that direction; and as it seems improbable that they could have fallen that way if Schultz had not released the chains before the plates were attached to the crane, his negligence in this respect can well be considered the sole cause of the accident, as was found by the Court."

The Court arrived at its conclusion in the teeth of the evidence directly to the contrary. It ignored the fact that the steel plates were thin and quite limber. It is undisputed that the plates were ten feet in width, rested on stirrups two to three feet below the platform of the truck

and extended above the stakes placed in stake-holes on either side of the truck platform. It was because of the fact that the plates extended above the stakes that Kellogg, the truck driver, who drove the truck from Chicago to Milwaukee, picked up a bed spring along the way. He testified that the plates were approximately three-eighths of an inch thick, and that there were three plates on each side of the truck (Exhibit 11, Page 119) and that the stakes on either side of the truck platform extended approximately thirty-six inches above the floor of the platform; (Exhibit 11, Pages 121-122) that after he had traveled approximately fifty miles, he picked up a bed spring by the side of the road, so that the tension on the chains would not have a tendency to pull the top of the plates together. (Exhibit 11, Page 126.)

In the light of the physical characteristics of the plates, it will be seen that upon the removal of the bed spring, the top of the plates could be swung inward especially when the ladder was placed against the top of the plates. This would result in loosening the chains and the movement might be great enough to cause one of the hooks to fall off the top of the plates. It is possible that Shrake caused the hook on the south plates to fall off, particularly in view of the testimony of Goyk that while he saw a hook on the plates which fell on the north side, he did not find the hook on the plates which fell on the south side. (Exhibit 11, Page 204.) This is significant because it is undisputed that the plates on the south side fell first.

The correct explanation of the occurrence is found in the statement of Frank Drabeck, one of the employees of Allis-Chalmers which was given on July 22, 1937, three days after the accident. (Tr. 130.) Drabeck was an eyewitness to the accident. He stated that all the chains and the bed spring which were used in fastening the plates were removed, except one chain which ran from the top of

the plates on the south side to the top of the plates on the north side. This was the only chain fastened when Shrake climbed up on the ladder to put on the C-clamp. Drabeck gave the following dramatic explanation of the cause of the accident: "The way I believe the accident happened was that when Shrake climbed up the ladder and as he neared the top, his weight caused the plates to spring in and then sprung back sufficiently to have them fall over on to Shrake who was pinned underneath." (Tr. 130.)

If Drabeck's explanation of the accident was correct, the plates did not fall because of any negligence on the part of Schultz. Assuming *arguendo,* that Schultz should not have touched the chains, there was nevertheless no liability on the part of Royal Transit for the injury to Zamecnik. The cause of the falling of the plates was the acts of Shrake on the ladder. The situation created by the acts of Schultz was static, a condition rather than a cause. *Swinkels* v. *Wisconsin Michigan Power Co.,* 221 Wis. 280, 287; *Schultz* v. *Brogan,* 251 Wis. 310.

The testimony at the trial of the Zamecnik action clearly indicated that Zamecnik was injured because he went out of his way to inspect the load of steel plates. Zamecnik testified at his trial that while he was working in the tool room, he had a call of nature which made it necessary for him to go to the toilet; (Exhibit 11, Page 284) that the toilet room regularly used by him was a block distant; (Exhibit 11, Page 284) that in going to and returning from the toilet he followed the same path up to the point where he was injured. (Exhibit 11, Page 284.) The route followed by Zamecnik according to his testimony (Exhibit 11, Pages 292-293) was easily followed on a diagram marked Exhibit R at the Zamecnik trial. (Exhibit 11, Page 532.) His testimony indicated that he did not follow the most direct route in going to and returning from the toilet.

The reason why Zamecnik did not follow the most direct

route, but instead walked past the truck was that the load of plates was a novelty in the plant. Goyk testified that because of the vertical position of the plates and the method of fastening them his attention was directed to the load. (Exhibit 11, Page 469.) Jolitz testified that he had never seen a load like that; that plates usually came into the shop laid flat on the platform of the truck; that his attention was focused on the truck because of the bed spring. (Exhibit 11, Pages 228, 242, 243, 402, 406.) Schilling frankly admitted that he was intrigued by the load and went over to the truck simply for the purpose of observing what was going on. (Exhibit 11, Pages 420, 421.) Drabeck went over to the load and kidded Schultz about going into the furniture business because of the bed spring on the load. (Exhibit 11, Pages 317, 322.)

Schultz testified that Zamecnik stood loitering about the truck for five or ten minutes before the accident occurred. (Exhibit 11, Page 469.) No effort was made by Zamecnik to contradict Schultz's testimony in this respect.

It thus clearly appears that Zamecnik had no business to be in the vicinity of the truck, and that he deliberately loitered around the truck for five or ten minutes before he was injured.

A studied effort was made at the trial to justify Zamecnik's presence in the vicinity of the truck upon the basis that he was walking between red lines painted on the floor marking the boundary of safety lanes. A preponderance of the credible evidence, however, demonstrated that the witnesses who testified with reference to the red lines were mistaken. The defendant, Royal Transit, called as a witness Frank Miracky, the assistant superintendent of the Allis-Chalmers plant at the time of the accident. (Exhibit 11, Page 446.) Miracky testified that the only safety lanes were those which extended five feet outside of the edge of the railroad cars which were operated on the railroad

tracks running into the shops. (Exhibit 11, Page 456.) At the point where the accident happened there were no railroad tracks; the only tracks at that point were tracks on which Allis-Chalmers hand trucks were operated. (Exhibit 11, Page 449.) Drabeck testified that the safety lanes ended where the railroad tracks started. (Exhibit 11, Page 324.) According to the diagram marked Exhibit R, which was introduced at the Zamecnik trial (Exhibit 11, Page 532), the red line stopped at a point eighty-five to ninety feet east of the truck. It appeared therefore, from the testimony of Miracky that Zamecnik was not travelling in any safety lane at the time he received his injury.

Because of the fact that Zamecnik did not travel in the most direct route in going to or returning from the toilet and in view of the fact that he was not travelling in safety lanes but had turned aside from his duties to loiter in the vicinity of the truck for five or ten minutes, it was the contention of the Royal Transit Company that Zamecnik was guilty of contributory negligence. Certainly there was enough evidence to support a jury verdict of contributory negligence.

In view of the facts the petitioner takes the position that it had a right to obtain a decision of a Court as to the liability of its assured, Royal Transit, Inc. without being subject to the charge that it was guilty of bad faith in refusing to settle the Zamecnik action.

Errors Relied Upon.

The United States Circuit Court of Appeals erred:

(a) In holding that *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597, is not controlling upon the ground that there the assured indicated that the case should not be settled.

(b) In holding that the attorneys for the insurance com-

pany recognized that there was a likelihood of a judgment being entered in excess of the policy limits.

(c) In holding that throughout the compromise negotiations there was no discussion of liability.

(d) In holding that the insurance company was guilty of bad faith in refusing to adopt the suggestions of its attorneys with reference to settlement.

(e) In holding that Miller, the representative of the insurance company, stubbornly refused to adopt the suggestions of settlement and obstinately and in bad faith overrode the suggestions of the attorneys for the insurance company to settle.

(f) In holding that the evidence of reinsurance indicated bad faith in refusing to settle.

ARGUMENT.

I.

Berk v. Milwaukee Automobile Insurance Company, 245 Wis. 597, Is Controlling.

In *Berk* v. *Milwaukee Automobile Insurance Company*, 245 Wis. 597, the Supreme Court of the State of Wisconsin refused to permit recovery against an insurance company for an amount in excess of the policy limits where it appeared that the insurance company had made a proper investigation and concluded that the case was one of no liability. It is true that there was a fugitive statement in the lengthy decision to the effect that the assured never requested or even suggested that the insurance company make a settlement but that on the contrary he indicated no settlement should be made. This statement, however, was mere *obiter dicta*. Had the Circuit Court of Appeals followed the decision in the *Berk* case, it would have been compelled to reverse the judgment of the District Court in favor of the plaintiff.

II.

The Conclusion of the Circuit Court of Appeals That the Attorneys for the Insurance Company Recognized the Likelihood of a Judgment Being Entered in Excess of the Policy Limits Is Not Supported by the Evidence.

Shortly after the Zamecnik action had been instituted, Mr. Dougherty, one of the attorneys representing the insurance company, addressed a letter to Royal Transit, Inc. in which he stated that there was a likelihood that the judgment entered might be in excess of the policy limits.

(Transcript in Circuit Court of Appeals, Page 119.) Mr. Dougherty, at the trial, however, testified that there was no intent to pass judgment on the liability of Royal Transit, Inc. at the time, because the investigation had not been completed. (Tr. 119.) Notwithstanding the explanation of Mr. Dougherty, both the District Court and the Circuit Court of Appeals attempted to torture the language by concluding that an opinion was being given prior to a complete investigation of the facts. Regardless of the opinion of Mr. Dougherty, the insurance company was not bound to act upon it as indicated by the decision in *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597, where the Court cites with approval (Pages 605-606) *Wakefield* v. *Globe Indemnity Company,* 246 Mich. 645, 225 N. W. 643. In that case the insurance company was exonerated of liability for any amount in excess of the policy limits despite its failure to follow the advice of its attorneys who concluded that the case was hopeless and could not be successfully defended.

III.

The Finding That Throughout the Compromise Negotiations There Was No Discussion of Liability Is Not Sustained by the Evidence.

The evidence with respect to negotiations for a compromise settlement is undisputed. It consists in part of the notes of Judge Sullivan, one of the Circuit Judges of the Circuit Court for Milwaukee County, who conducted settlement negotiations. In his original notes, which constitute a portion of the printed transcript upon appeal to the Circuit Court of Appeals, there is a statement that the defense contended that there was no duty on Royal Transit to unload the truck, that the driver stood near the cab and did not know that the ladder was being placed against the

plates, and that Schultz did nothing except to remove the bed spring and to unfasten the front clamps. (Tr. 140-141.) It also appears that Royal Transit, Inc. contended that the plates fell because of the negligence of Shrake in putting up the ladder from the outside. (Tr. 142.) Lastly, Royal Transit contended that the driver of the truck in unloading the plates was an employee of Allis-Chalmers which precluded any liability on the part of the truck company. (Tr. 142.) The testimony of one of the attorneys who tried the action for the insurance company was that the insurance company had a number of defenses which were vigorously urged at the time of the trial. (Tr. 97-105.)

IV.

Refusal of an Insurance Company to Adopt the Recommendations of Its Attorneys With Reference to Settlement Does Not Constitute Bad Faith.

Major reliance was placed by the Circuit Court of Appeals upon the fact that the attorneys for the plaintiff in the Zamecnik action, the attorneys for the reinsurer and the attorneys who tried the case for the insurance company all recommended settlement. In *Berk* v. *Milwaukee Automobile Insurance Company*, 245 Wis. 597, the Court cited with approval *Wakefield* v. *Globe Indemnity Company*, 246 Mich. 645, 225 N. W. 643, in which it was held, as previously pointed out, that failure on the part of an insurance company to settle a case in accordance with the suggestions of its counsel, does not constitute bad faith.

V.

Neither Stubbornness, Nor Obstinacy, on the Part of an Insurance Company in Refusing to Settle a Case, Constitutes Bad Faith.

The Circuit Court of Appeals in its decision placed the blame for failure to settle the Zamecnik action upon L. P. Miller, the representative of the insurance company, who determined that the action should not be compromised. In castigating Mr. Miller, the Circuit Court of Appeals opprobriously described Mr. Miller as being stubborn and obstinate. Significantly the Circuit Court of Appeals did not cite a Wisconsin decision holding either directly or inferentially that either stubbornness or obstinacy may furnish a ground for a finding of bad faith.

Bad faith is a species of fraud and evidence to sustain such a finding must be clear, satisfactory and convincing. *Berk* v. *Milwaukee Automobile Insurance Company,* 245 Wis. 597; *Lange* v. *Heckel,* 171 Wis. 59; *Ziegler* v. *The Insurance Company,* 238 Wis. 238.

It is too clear for argument that mere obstinacy or stubbornness falls far short of fraud. In order to constitute fraud in the case at bar there must be a finding that the decision to litigate rather than to compromise was arbitrary, capricious, without rational basis and was actuated by ill will and a desire to inflict harm on the insured. Where, as here, there has been an efficient and painstaking investigation and where a man such as Miller, with wide experience in thousands of cases, determines that the case can be successfully defended, there is no basis for a conclusion of bad faith.

VI.

The Fact That Central Surety & Insurance Corporation Had Procured Reinsurance Has No Bearing on the Question of Bad Faith.

The evidence at the trial indicated that Central Surety & Insurance Corporation had reinsured its liability in excess of $5,000.00. This fact was seized upon by the Circuit Court of Appeals as indicative of an arbitrary and capricious decision on the part of the insurance company in failing to settle the Zamecnik action because of the small stake which the insurance company had in the action.

We contended in the District Court and in the Circuit Court of Appeals that the fact of reinsurance was immaterial to a determination of the question of bad faith in refusing to compromise the Zamecnik action. If a cogent argument may be made that the insurance company ought to have settled because its stake was a mere $5,000.00, then an equally cogent argument might be made that the insurance company was justified in not settling because of the small amount involved.

Royal Transit, Inc. could easily have prevented any embarrassment to it with respect to liability in excess of the policy limits by procuring and paying for a larger policy. It determined, however, that the policy in the amount of $45,000.00 for a single accident was adequate, and thereby assumed the risk of liability for serious personal injuries exceeding that amount. The insurance company chose to reinsure its risk in excess of $5,000.00. It, therefore, might properly have determined to defend the action since in any event its maximum liability would not exceed $5,000.00.

Actually the reasoning of the Circuit Court of Appeals was fallacious. The Court will take judicial notice of the fact that reinsurance must be paid for. The expenditure

of the reinsurance company in the Zamecnik case was paid for by Central Surety & Insurance Corporation. It is the history of reinsurance contracts with particular insurance companies which measures the cost of reinsurance, and the practice is so well established that the Court might well take judicial notice of this fact.

In any aspect of the situation, therefore, the question of reinsurance has no bearing upon the question of the bad faith of the insurance company in refusing to settle the Zamecnik action.

Conclusion.

In conclusion, we submit that the Circuit Court of Appeals has decided an important question of Wisconsin law in conflict with the applicable Wisconsin Supreme Court decision. The application of the insurance company, therefore, for a writ of certiorari should be granted.

Respectfully submitted,

SUEL O. ARNOLD,
Attorney for Petitioner.

GLENN R. DOUGHERTY,
Of Counsel.

FILE COPY

Office Supreme Court, U. S.
FILED
SEP 16 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 240

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

LEO J. LANDRY,
EUGENE WENGERT,
Attorneys for Respondent.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

Important Evidence.

		PAGE
1.	Evidence establishing that the negligent conduct of Schultz clearly constitutes the cause of the fall of the plates and the resulting injury to Zamecnik ...	2
2.	Evidence establishing that after creating this dangerous condition, Schultz was unmindful of the danger to others	3
3.	Evidence establishing that Shrake did not cause the plates to fall	3-4
4.	Evidence establishing that Zamecnik was not guilty of contributory negligence	4-5
5.	Evidence establishing that prior to the trial of the Zamecnik case, petitioner had full knowledge of the facts and circumstances upon which liability was predicated, and had full knowledge of the nature and extent of the injuries, and was not surprised by any of the testimony offered at the trial	5
6.	Evidence establishing that petitioner could have settled the Zamecnik case for $35,000 and that there was a consensus of opinion by all the attorneys that it was a liability case that should be settled for that amount	6
7.	Evidence establishing that the conduct of Miller constitutes bad faith	7
8.	Evidence disclosing a pattern of conduct on the part of petitioner that was neither intelligent nor honest	8

ARGUMENT.

I. The opinion of the Wisconsin Supreme Court in Zamecnik *vs.* Royal Transit, Inc. is not a proper subject of review because it turns entirely upon a question of local law 9

II. The Honorable United States Circuit Court of Appeals faithfully followed the decisions of the Wisconsin Supreme Court in applying the law to the facts 9-11

1. The insurance company must not abuse the power vested in it and recklessly and contumaciously refuse to settle if it is apparent that in all reasonable probability the damages will exceed the policy limit 9

a. The record discloses that Miller's refusal to discharge his obligation was arbitrary, capricious and without rational basis, and supports the finding of bad faith 10

2. The conduct of the insurance company in reference to claims of this nature must be subjected to close scrutiny to determine whether it acted in bad faith toward the insured 10

3. Good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto 11

4. In the Lanferman Case the insured's attorney had informed the insurance company's counsel that he believed a verdict in excess of the policy limit would be returned and had demanded that the insurance company settle within those limits. The insurance company's attorney claimed that he would be able to obtain a finding of contributory negligence. No offer of settlement was made prior to trial. Held, the findings of bad faith was warranted 11

III. The decision of the Circuit Court of Appeals is not in conflict with the case of Berk *vs.* Milwaukee Automobile Ins. Co. 11-17

1. The Berk Case approved the rule stated in the Hilker Case that the insurance company's decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. It must be honest and intelligent if it be a good faith conclusion 11-12
2. In the Berk Case the insured not only failed to request or suggest that the insurer make a settlement but *clearly* indicated that *no settlement* be made 12
   a. The insurer could hardly be guilty of bad faith toward its insured for refusing to make a settlement when such refusal was agreed to or joined into by the insured ... 12
3. The Kuhle Case, out of which the Berk case arose, involved a close question of law. The insurer and its attorneys vigorously contended that there was no liability 12-13
4. The facts in the Berk Case are clearly distinguishable from those in the instant case .. 13
5. The Berk Case does not modify or change the rule laid down in the Hilker Case but, on the contrary, quotes approvingly the rules therein stated 14
6. The Wakefield Case approves the rule laid down in the Wisconsin Zinc Co. Case 14
   a. The facts are clearly distinguishable from those in the instant case 14-15
7. The right to control the litigation in all of its aspects carries with it the correlative good faith, honest and conscientious fidelity to the common interest of the parties 15-16

IV. Petitioner's interpretation of the law in its application to the facts in the case at bar is clearly erroneous 16-17

Conclusion 17

TABLE OF CASES AND AUTHORITIES.

Berk v. Milwaukee Automobile Insurance Company, 245 Wis. 597 .....11, 12, 13, 14, 15

Kuhle v. Ladwig, 237 Wis. 147 .....12, 13

Hilker v. Western Automobile Insurance Co., 204 Wis. 1 .....10, 11, 12, 14, 15

Lanferman v. Maryland Casualty Co., 222 Wis. 406 ... 11

Wakefield v. Globe Indemnity Co., 246 Mich. 645, 225 N. W. 643 14

Wisconsin Zinc Co. v. Fidelity & D. Co., 162 Wis. 39 .. 9, 14

Traders & General Ins. Co. v. Ruco Oil & Gas Co., 129 F. 2d 621 .....15, 16

Zamecnik v. Royal Transit, Inc., 239 Wis. 175 .....2, 4, 5, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. .....

CENTRAL SURETY & INSURANCE CORPORATION,
A FOREIGN CORPORATION,
Petitioner,

vs.

ROYAL TRANSIT, INC., A FOREIGN CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

ADDITIONAL STATEMENT OF FACTS.

Counsel for petitioner admit in their brief (Page 8) that, "There are no controverted issues of fact in this case." We deem it necessary to present some of these facts, omitted by petitioner, that are material to the consideration of the question presented.

IMPORTANT EVIDENCE.

1. Evidence Establishing That the Negligent Conduct of Schultz Clearly Constitutes the Cause of the Fall of the Plates and the Resulting Injury to Zamecnik.

A detailed description of the manner in which the steel plates were fastened on the truck appears in the opinion of the Wisconsin Supreme Court in the case of *Zamecnik* v. *Royal Transit, Inc.*, 239 Wis. 175 (R. 111-112). The proofs clearly establish that Schultz well knew that the usual and customary and only safe way of unloading such plates was to have them firmly attached to an overhead crane prior to the loosening and detaching of the chains that were holding them in a position of safety on the truck (R. 40, 45, 114-115). Nevertheless Schultz unfastened and removed the chains before the steel plates were attached to an overhead crane (R. 43-46, 49-51, 56). Two employees of Allis-Chalmers Co. warned Schultz of the danger (R. 50, 54). Schultz's only excuse was that he was getting impatient about the delay of unloading and wanted to get away (R. 45, 47). On this point the Wisconsin Supreme Court in the *Zamecnik* Case said (R. 115):

> "* * * As Schultz well knew the danger incidental to such loosening of the chains before the plates were hitched to the overhead crane, the record well warranted holding that Schultz was negligent in loosening the chains at the time and in the manner in which he did, and that such negligent conduct on his part clearly constitutes the cause of the fall of the plates and the resulting injury to Zamecnik and Shrake."

2. Evidence Establishing That After Creating This Dangerous Condition, Schultz Was Unmindful of the Danger to Others.

After creating this dangerous condition, Schultz was fearful that the plates would fall, so he took a position on the truck for his own safety (R. 44). Although he knew that a C-clamp had to be attached to the top of the plates before they could be attached to an overhead crane (Exhibit 11, page 377), Schultz did not warn Shrake of the danger when he saw him with a wrench to tighten the C-clamp. Schultz said that he was not concerned with what Shrake did (R. 44). Nor did he warn Zamecnik of the danger. He said that he did not say a word to anybody (R. 45).

3. Evidence Establishing That Shrake Did Not Cause the Plates to Fall.

Counsel for petitioner say in their brief, page 11:

> "* * * It is possible that Shrake caused the hook on the south plates to fall off, particularly in view of the testimony of Goyk that while he saw a hook on the plates which fell on the north side, he did not find the hook on the plates which fell on the south side. This is significant because it is undisputed that the plates on the south side fell first."

The reasoning of counsel for petitioner on this point is absolutely false, and their statement of the facts on page 9 of their brief is their own refutation. There they show the testimony of Goyk that he saw *Schultz* remove the hook from the top of the plates on the *south side*. This clearly establishes: (1) that Shrake did not cause the hook on the south plates to fall off; (2) that Goyk could not find the hook or chain on the plates on the south side, because

Schultz had previously removed the hook and placed it in the truck.

Nor is it perceived that there is any adequate basis for blaming Shrake who, in the regular routine of his duty, was climbing the ladder to attach the C-clamp to the chains, and was unaware of the dangerous condition created by Schultz. On this point the Supreme Court of Wisconsin in the *Zamecnik* Case said (R. 115-116):

> "• • • The ladder leaning inward against the outside of that set of plates and Shrake's weight, while standing on the ladder, necessarily tended rather to press the top of the plates inward and to thus retard their falling outward, instead of causing them to fall in that direction; and as it seems improbable that they could have fallen that way if Schultz had not released the chains before the plates were attached to the crane, his negligence in this respect can well be considered the sole cause of the accident, as was found by the Court."

4. Evidence Establishing That Zamecnik Was Not Guilty of Contributory Negligence.

There is the testimony of several employees of Allis-Chalmers Co. on this point and it is summarized by the Wisconsin Supreme Court in the *Zamecnik* Case as follows (R. 116):

> "• • • It appears from the record that the evidence admitted finding that Zamecnik, in returning to his place of work, was walking in an aisle designated by red lines as a place that was to be kept clear for walking purposes; that as he was proceeding between these safety lines toward the parked truck he saw the ladder leaning against the plates and when he was about even with the front end of the truck he saw also Benjamin Goyk, who was then about seventy-five to one hundred feet east of the truck and looking toward the right side thereof, 'hollering' and waving his arms, but

that Zamecnik did not know at whom Goyk was waving or of any impending danger; but that as Zamecnik looked up and saw the plates tipping over and the man and the clamp coming toward him, he put his hands over his head to try to get away, but was struck down by the falling plates.

"In view of these facts there does not appear to have been any failure on the part of Zamecnik to exercise ordinary care, * * *"

5. Evidence Establishing That Prior to the Trial of the Zamecnik Case, Petitioner Had Full Knowledge of the Facts and Circumstances Upon Which Liability Was Predicated, and Had Full Knowledge of the Nature and Extent of the Injuries, and Was Not Surprised by Any of the Testimony Offered at the Trial.

Miller, agent for petitioner who had complete control of all negotiations relative to settlement and compromise of the Zamecnik action and whose decision prevented a settlement, testified that he knew all of the facts before the trial, that he had examined all the reports, and that there was no new testimony introduced during the trial that surprised him (R. 96). On this point the Circuit Court of Appeals said (R. 176-177):

"The defendant was not surprised at any of the testimony offered at the Zamecnik trial, either as to the cause or extent of his injuries. All such facts were in its possession long prior to the trial; in fact, defendant emphasizes the thorough investigation which it made and the complete information which it possessed relative to the Zamecnik claim. * * * While the lack of a proper investigation may be evidence of bad faith, it does not follow that a proper investigation and ascertainment of the facts is sufficient to establish good faith. Having thus obtained the facts, it was still charged with the duty of acting upon the same in a good-faith manner."

6. Evidence Establishing That Petitioner Could Have Settled the Zamecnik Case for $35,000 and That There Was a Consensus of Opinion by All the Attorneys That It was a Liability Case That Should Be Settled for That Amount.

Prior to the commencement of the *Zamecnik* Case, the attorneys for petitioner wrote a letter to respondent stating that there was the "*likelihood*" that a judgment might be entered for an amount "*much in excess*" of the policy of insurance (R. 119, Exhibit 19). In commenting on this letter, the Circuit Court of Appeals said (R. 176):

> "* * * Thus, in the beginning the attorneys for the defendant recognized both the likelihood of liability to Zamecnik and that the character of his injuries was such that a judgment might be obtained in excess of $45,000, defendant's maximum liability."

Counsel for respondent repeatedly urged settlement and offered to contribute $3,500 in behalf of respondent in order to effect a settlement (R. 71-72). Later, he offered to contribute $5,000 toward the settlement (R. 75, 78, 82). It is admitted by counsel for petitioner (Petition, page 2) that the case could have been settled for $40,000, of which amount the respondent agreed to pay $5,000. Attorney Paulsen, who represented the reinsurance company, testified that he considered right along that it was a liability case that should be settled and he urged settlement for $35,000, and Attorney Arnold, who was in charge of the trial for petitioner, was in hearty accord (R. 77). As said by the Circuit Court of Appeals (R. 177):

> "* * * It is implicit in the testimony concerning these conferences as well as the proceedings at the conciliation hearing that all the attorneys recognized that Zamecnik could establish liability."

7. Evidence Establishing That the Conduct of L. P. Miller Constituted Bad Faith.

In an attempt to justify his refusal to settle the *Zamecnik* case, Miller gave three different reasons:

A. He testified that he treated the matter as a horse-trading proposition (R. 94). On this point the Circuit Court of Appeals said (R. 178):

> "* * * We assume that even a 'horse trader' if successful must at some point make an offer."

B. He testified that he was waiting for Zamecnik to submit a figure less than $45,000 (R. 95). This excuse is false for it is admitted that Miller refused an opportunity to settle for petitioner for $35,000.

C. He testified later that his refusal to settle was predicated on lack of negligence on the part of Schultz (R. 95). This excuse is without substance, for the record is clear and conclusive that Schultz was negligent.

The attitude of Miller is fairly presented by the Circuit Court of Appeals as follows (R. 178):

> "As to Miller's attitude, the lower court found:
> '* * * that said Miller stubbornly and persistently refused to adopt any of the suggestions of other attorneys of wide experience in negligence cases when they advised settlement for less than the policy coverage and he obstinately and in bad faith repudiated and overrode the suggestions of the attorneys for the reinsurer and defendant's own attorneys who were conducting the defense of the Zamecnik case when they both advised and urged settlement for $35,000.'
> "We think the evidence adequately supports the characterization which the court thus applied to Miller."

8. Evidence Disclosing a Pattern of Conduct on the Part of Petitioner That Was Neither Intelligent Nor Honest.

When counsel for respondent urged settlement, the attorneys for petitioner warned that such attitude "does not constitute an attitude of cooperation and compliance with the terms of the policy" (R. 120, Exhibit 20). Counsel for respondent wrote to the attorneys for the petitioner that respondent would look to petitioner for indemnification in the event judgment exceeded the liability provided for in the policy, and urged settlement in accordance with the offer of settlement submitted (R. 121, Exhibit 21). In reply, the attorneys for petitioner said that respondent would not be justified in settling and that petitioner would challenge any act of settlement (R. 122, Exhibit 22). After judgment had been entered, counsel for respondent wrote to the attorneys for petitioner stating that respondent could settle for $15,000 and requested permission to do so (R. 123, Exhibit 23-A, 124, Exhibit 24-A). Petitioner refused and again warned against any action that would constitute a violation of the cooperative clause of the policy (R. 126, Exhibit 25).

ARGUMENT.

I.

The Opinion of the Wisconsin Supreme Court in Zamecnik v. Royal Transit, Inc., Is Not a Proper Subject of Review.

The *Zamecnik* Case, out of which the instant case arose, turns entirely upon a question of local law. It was there decided that the negligent conduct of Schultz *clearly* constitutes the cause of the fall of the plates and the resulting injury to Zamecnik. The statement of facts presented justifies this conclusion. Nevertheless, counsel for petitioner in their brief (Pages 9-14) devote considerable criticism of the opinion of the Wisconsin Supreme Court.

II.

The Honorable United States Circuit Court of Appeals Faithfully Followed the Decisions of the Wisconsin Supreme Court in Applying the Law to the Facts.

Indeed, the District Court and the Circuit Court of Appeals could have rendered no other decision upon the undisputed facts without ignoring the principle well settled in the State of Wisconsin which had been in existence for over one-quarter of a century. In 1916 in the case of *Wisconsin Zinc Co.* v. *Fidelity & D. Co.*, 162 Wis. 39, 54, the rule was stated:

> "• • • While the defendant had the right to consult what it deemed to be its own interest in making a settlement, it could not abuse the power vested in it and recklessly and contumaciously refuse to settle if it was apparent that in all reasonable probability its conduct would not only result in damage to the plaintiff but also in loss to itself."

A fair appraisal of Miller's stubborn refusal to accept any offer of settlement, or to make any counter proposal, is made by the Circuit Court of Appeals (R. 178):

> "In our judgment, the record discloses that his refusal to discharge this obligation was arbitrary, capricious and without any rational basis, and certainly the finding of bad faith is amply supported."

In the case of *Hilker* v. *Western Automobile Ins. Co.*, 204 Wis. 1, the policy limit was $5,000. A judgment of $10,500 was recovered. The action could have been settled within the policy limit, probably for $3,000. The Supreme Court said (page 8):

> "The interests of the insurance company being to so large an extent adverse to those of the plaintiff, its conduct while acting as agent of the plaintiff with reference to these claims must be subjected to close scrutiny in order to determine whether it acted in bad faith toward the plaintiff."

And (page 9):

> "With this evidence in the case, the jury were warranted in finding that a good-faith effort to protect the interests of the plaintiff required the company to do something more than to suggest an adjustment by the payment of such sums as $500, or even $1,500."

And (page 10):

> "* * * Under such circumstances the failure to make some more effective effort to adjust the cases does present evidence which sustains the finding that the defendant acted in bad faith toward the plaintiff in handling these claims and conducting this litigation."

Upon motion made for a rehearing in the *Hilker* case, Mr. Justice Owen handed down a "clarifying" opinion, stating (page 13):

> "* * * The subject has received our earnest reconsideration, and it is to be hoped that what is here

said will be characterized by a degree of clarity that will enable the views of this court, upon a question which seems to be in more or less tautological confusion, to be understood.* * * Bad faith, especially, is a term of variable significance and rather broad application. Generally speaking, good faith means being faithful to one's duty or obligation; bad faith means being recreant thereto."

In the case of *Lanferman* v. *Maryland Casualty Co.*, 222 Wis. 406, the policy limit was $5,000; a judgment in excess of $15,000 was recovered. The case could have been settled for the policy limit. The insured's attorney had informed the insurance company's counsel that he believed a verdict in excess of the policy limit would be returned and had demanded that the insurance company settle within those limits. *No offer of settlement was made prior to trial.* The insurance company's attorney claimed that he would be able to obtain a finding of contributory negligence. The Supreme Court said (page 409):

"* * * Upon the testimony as to all these matters, which the jury might rightly believe, we consider that the findings of bad faith on the part of the defendant was warranted."

III.

The Decision of the Circuit Court of Appeals Is Not in Conflict With the Case of Berk v. Milwaukee Automobile Ins. Co., 245 Wis. 597.

Indeed, the Circuit Court of Appeals carefully analyzed the *Berk* case and recognized the facts that distinguish it from the instant case. The court said (R. 173-174):

"In the Berk case, the latest of the Wisconsin Supreme Court cases, while the judgment was reversed because of the insufficiency of the proof to sustain a finding of bad faith, the court nevertheless recognized

the duty imposed upon an insurer as announced in its previous decisions. For instance, on page 602, it quoted with approval from its former decision in the Hilker case, as follows:

"'But because it has taken over this duty, and because the contract prohibits the insured from settling, or negotiating for a settlement, or interfering in any manner except upon the request of the insurer, such as assisting in the securing of witnesses, etc., its exercise of this right should be accompanied by considerations of good faith. Its decision not to settle should be an honest decision. It should be the result of the weighing of probabilities in a fair and honest way. * * * It must be honest and intelligent if it be a good-faith conclusion.'"

Then the Circuit Court of Appeals comments further as follows (R. 174):

"Notwithstanding the strong reliance which defendant places upon the Berk case, we think it is so clearly distinguishable on the facts as to furnish little if any support for defendant's contention in the instant case. One circumstance alone may be mentioned. There, as pointed out by the court, the insured not only failed to request or suggest that the insurer make a settlement but 'clearly indicated that no settlement be made.' It is difficult to discern how the insurer in any case could be guilty of bad faith toward its insured for refusing to make a settlement when such refusal was agreed to or joined into by the insured."

The *Berk* case arose out of the case of *Kuhle* v. *Ladwig*, 237 Wis. 147. In that case, the insurer contended that Kuhle, at the time of his fatal injury, was engaged in an illegal and criminal enterprise, and that an injury to one while engaged in such a transaction could not be made the basis of an action for damages. As the court said in the *Berk* case (Page 608):

"* * * upon their full investigation of the facts and law they (the insurer and its attorneys) concluded

that it was a case of no liability. The contention of respondent that defendant did not rely on the advice of its counsel is contrary to the undisputed evidence."

And (page 605):

"Defendant's adjusters and attorneys have vigorously contended from the start to the present time that there was no liability in the Kuhle case. Ladwig never requested or even suggested that defendant make a settlement in the Kuhle case. On the contrary, he clearly indicated that no settlement be made."

And (page 608):

"* * * There is no evidence that any settlement could have been made, after trial in the circuit court, and prior to the commencement of the present action, for less than the full amount of the judgment."

It is apparent, therefore, that the facts in the instant case clearly distinguish it from the *Berk* case in the following respects:

(A) In the instant case, it was apparent that liability would exceed the policy limit and the attorneys agreed it was a case of liability.

(B) The insured urged settlement and offered to contribute $5,000 to effect a settlement.

(C) Petitioner could have settled for $35,000 and was urged to do so by the attorneys.

(D) Miller refused the offer and refused to make any counter proposal, justifying his decision on the following grounds:

1. That he considered it a "horse-trading proposition."

2. That he was waiting for Zamecnik to submit a figure less than $45,000. (It is admitted that he could have settled for $35,000.)

3. That his refusal to settle was predicated on lack of negligence on the part of Schultz.

(E) Settlement could have been made after trial for less than the full amount of the judgment.

Therefore, the conclusion to be drawn from an analysis of the *Berk* case is:

(1) The facts in the *Berk* case are clearly distinguishable from those in the instant case.

(2) Not only is there no suggestion in the opinion in the *Berk* case to modify or change the rule laid down in the *Hilker* case but, on the contrary, the court quotes approvingly the rules therein stated.

Moreover, it is significant that the case of *Wakefield* v. *Globe Indemnity Company,* 246 Mich. 645, 225 N. W. 643, relied upon by petitioner, quotes approvingly the rule from the *Wisconsin Zinc Co.* case, which we have heretofore set forth in full. After an examination of the opinion of the court and the facts presented, it is clearly apparent that the Michigan court approves the rules stated in the *Hilker* case. The court said that there is but one criterion by which one's action in deciding matters in which the rights of others are involved should be judged, and that is (page 646):

"Did they exercise an honest judgment?"

The court then calls attention to the fact that two defenses were being interposed, and, if either of them should be sustained as a matter of law, plaintiff could not recover in any amount. One of the defenses involved a legal question that had never been considered by the Michigan Supreme Court. Counsel for the defendant cited several decisions of courts in other jurisdictions which supported its claim in this respect. Commenting on these facts, the court said (page 647):

"* * * Mr. Campbell's declination of the offer was but an expression of confidence on his part that the legal defenses interposed were well taken. Surely it cannot be said to have been actuated by a lack of honest or fair dealing towards the city, amounting to what, in law, is denominated 'bad faith' * * *"

The observations are peculiarly apt when applied to the acts in that case. On the other hand, it would be inaccurate and a tortured construction of the facts in the case at bar to say that petitioner was actuated by "honest or fair dealing" towards the respondent.

In the *Berk* case, *supra*, the court quoting approvingly from the *Hilker* case, said (page 603):

> "* * *In order that it be honest and intelligent it must be based upon a knowledge of the facts and circumstances upon which liability is predicated, and upon a knowledge of the nature and extent of the injuries so far as they reasonably can be ascertained."

Miller admits he knew all the facts disclosing liability; he knew that Zamecnik had a permanent and total disability and that the damages would greatly exceed the policy limit (R. 95). No new testimony was introduced during the trial that surprised him, or that would change his opinion (R. 96). The question to which no adequate answer has as yet been given is: How could Miller hope to settle the case if he rejected all offers of settlement approved by petitioner's attorneys and refused to suggest any counter proposal? We believe the District Court expressed it properly by saying (R. 148):

> "* * * Apparently he liked the idea of gambling with the money of other people."

And (R. 150):

> "* * * In the case at bar we have a stubborn, unyielding Mr. Miller, deaf to entreaties and advice alike, who in his own words 'was engaged in a game of horse trading.'"

Miller brazenly abused the power of settlement vested in him. As the court stated in *Traders & General Ins. Co.* v. *Rudco Oil & Gas Co.*, 129 F. 2d 621, 627, with reference to a similar situation:

> "Exclusive authority to act does not necessarily mean the right to act arbitrarily.* * * The right to control the litigation in all of its aspects carries with it the correlative good faith, honest and conscientious fidelity to the common interest of the parties."

It is, in effect, the identical rule stated by the Wisconsin Supreme Court in the case of *Wisconsin Zinc Co.* v. *Fidelity & D. Co.*, 162 Wis. 39, 54, hereinbefore stated.

IV.

Petitioner's Interpretation of the Law in Its Application to the Facts in the Case at Bar Is Clearly Erroneous.

We pause now to draw together and generalize the undisputed testimony heretofore presented and the contention of petitioner, because, together, they illustrate the fallacy of petitioner's interpretation. In effect, petitioner advances the following argument:

We were not surprised at any of the testimony offered at the Zamecnik trial, either as to the cause or extent of his injuries because all the facts were in our possession long prior to the trial. The facts clearly established that Schultz's negligence was the cause of the injuries to Zamecnik, and that such injuries were serious and permanent. We warned respondent that there was the likelihood that a judgment might be entered for an amount much in excess of the limit of the policy of insurance. All the attorneys considered the case as one of absolute liability, but when respondent urged settlement and offered to contribute $3,500 toward the settlement, our agent, Miller, refused to settle and we warned respondent that its attempts to settle were in violation of the cooperative clause of the policy. Later Zamecnik offered to settle for $40,000 and respondent offered to contribute $5,000 if we would pay the other $35,000. Although our attorneys were in

hearty approval of this offer, and the attorney for the reinsurance company urged us to accept, Miller again refused and also refused to make any counter proposal. It is true that Miller gave no rational basis for his refusal. After judgment, the respondent could have settled for less than the judgment, but we refused to consent to such a settlement. While it is true that Miller was stubborn and obstinate and his decision to litigate rather than to compromise was arbitrary, capricious, and without rational basis, and while it is unfortunate that he treated the matter as "a horse trading proposition" and thereby caused substantial loss to respondent and the insurance companies, nevertheless we contend that there is no basis for a conclusion of bad faith.

Certainly, that is not the law in Wisconsin. It is the essence of unfairness and bad faith, as the authorities heretofore cited conclusively demonstrate. The facts clearly justified finding the petitioner guilty of bad faith.

Conclusion.

We submit that the judgment of the Circuit Court of Appeals is a most righteous one. Examination of the opinions of the Supreme Court of the State of Wisconsin shows that the Circuit Court of Appeals faithfully followed the decisions of the Wisconsin Supreme Court in applying the law to the facts. We do not perceive that petitioner has cited any authority sustaining its position.

We submit, therefore, that the application of petitioner for a writ of certiorari should be denied.

Respectfully submitted,

Leo J. Landry,
Eugene Wengert,
Attorneys for Respondent.